S.B. Criminal Misc. Petition No.1312/2005

Bhushan Prakash @ Prasad V/s State & Ors.

Date of Order : 21st August, 2006

HON'BLE MR. R.S. CHAUHAN, J.

Mr.Sohan Lal Sharma, for the petitioner.
Mr.Arun Sharma, PP for the State.

The complainant-petitioner has challenged the order dated 26.8.2005 passed by the Judicial Magistrate, First Class, Bassi, District Jaipur wherein after recording the statement of the complainant, the learned Magistrate has sent the case for further investigation under Section 156(3) of the Cr.P.C., to the Station House Officer, Police Station Kanota instead of taking cognizance for offence under Section 395, 420, 467, 468, 471 and 120B IPC.

The brief facts of the case are that the complainant is a driver by profession. He purchased a Tata 407, 21 Seater Mini-Bus having Registration No.RJ-12P-0485, 1996 Model bearing, Chassis No.357012 JTQ 835792, Engine No.497 SP 21 JTQ 806310 from the accused Shamshuddin vide agreement to sale dated 28.2.2004. The accused Shamshuddin and his agent, the accused Kailash Chandra Sharma, assured him that they would get the vehicle financed. For this purpose, the complainant gave Rs.36,000/- to Shamshuddin and Rs.5,000/- to Kailash

Sharma as brokerage. They were also given Rs.5,000/- towards expenses for preparing documents. Thus, in total, Shamshuddin and Kailash received Rs.51,000/- from the petitioner on 28.2.2004. The petitioner also claimed that he gave a further sum of Rs.20,000/- to these accused persons for changing the battery, wiring, barring, wheel cylinder, breaks, leather repairing and for changing of oil and head lights etc. He further claimed that the other co-accused persons received various other amounts from him. Thus, the accused persons received a total of Rs.2,11,000/-, and nothing remained due from the petitioner. According to the petitioner, he plied the bus for 15-20 days. Thereafter, on 6.5.2004 the accused persons took the bus away from him, on the pretext of getting the bus insured. But, they never returned the said bus. When he demanded the return of the bus, they threatened to kill him. In this manner, they have cheated the petitioner on 27.10.2004. The petitioner sent a notice to the accused Vijendra Sharma through his counsel. In October 2004, the petitioner saw the bus at the house of Shri Kalu Lala Ram Meena. He asked Shri Meena that as to how come he has the possession of the bus? Shri Meena informed the complainant that the accused persons have sold the bus to him. The petitioner further claimed that he went to the police station for lodging a report. But, the police refused to register the case. Thus, on 4.1.2004 he filed the complaint before the concerned Court. The statements of the complainant were recorded under Section 200, and that

of his witnesses under Section 202 Cr.P.C. But instead of taking cognizance on the basis of the statements, vide Order dated 26.8.2005, the learned Magistrate sent the case for further investigation under Section 156(3) of the Cr.P.C. Hence, this miscellaneous Petition before this Court.

Mr. Sohan Lal Sharma, the learned counsel for the petitioner, has vehemently argued that it is a settled position of law that once the statement of the complainant and his witnesses have been recorded by the learned Magistrate, the learned Magistrate cannot send the case for further investigation under Section 156(3) of the Cr.P.C. Therefore, the impugned order is void ab-initio. On the other hand, Mr. Arun Sharma, the learned Public Prosecutor for the State, has supported the impugned order.

We have heard both the learned counsels for the petitioner and for the State and have perused the impugned order.

Section 190 of the Cr.P.C. reads as under:-

> **190. Cognizance of offences by Magistrate** – (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

Section 200 of the Cr.P.C. reads as under:-

200. Examination of complainant – A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

Section 202 of the Cr.P.C. reads as under:-

202. Postponement of issue of process – (1) Any

> Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceedings:
>
> Provided that no such direction for investigation shall be made-
>
> (a) where it appears to the Magistrate that the offence complained of his triable exclusively by the Court of Sessions; or
>
> (b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.
>
> (2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:
>
> Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.
>
> (3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

A conjoint reading of these provisions clearly reveal that once a complaint is made to a Magistrate, who is authorized to take cognizance, the Magistrate may postpone the issuance of process against the accused, and either inquire into the case himself or direct an investigation to be

made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceedings. However, once the learned Magistrate has recorded the statement of the complainant under Section 200 of the Cr.P.C. and that of his witnesses under Section 202 of the Cr.P.C., thereby having inquired into the complaint, the Magistrate cannot direct further investigation by the police. For, the options given to the Magistrate are exclusive of each other. In the case of Sankar Chandra Ghose V/s Roopraj S. Bhansally (1981 Cr.L.J. 1002), their Lordships of the Calcultta High Court had held, “If a Magistrate postpones the issue of summons then two courses are open to him. He can either make an enquiry into the case himself or direct that an investigation be made. The Magistrate can direct an investigation to be made either by police officer or by such other person as he thinks fit. If he makes an enquiry himself, he cannot direct investigation. Again, when he directs an investigation, he cannot inquire into the matter himself.” Thus, both the situations of holding an inquiry and directing an investigation are mutually exclusively of each other. In case, the Magistrate has chosen the option of holding inquiry himself, he cannot direct further investigation by the police. For it would lead to redundancy of procedure to first inquire into the complaint, to record the statement of the complainant and witnesses, if any, and then to send the complaint for further investigation by the police. Therefore, the impugned Order dated 26.8.2005 is illegal.

Moreover, once certain judgments were submitted before the learned Magistrate, he was duty bound to discuss and to distinguish the case. He has neither dealt with the judgments, nor with the arguments submitted by the counsel for the complainant. Such a cryptic order tentamounts to a non-speaking order. Thus, the order deserves to be set aside.

In the result, this petition is allowed and the order dated 26.8.2005 directing further investigation by the police is quashed and set aside. The learned Magistrate is directed to proceed further in accordance with law.

(R.S. CHAUHAN), J.

/S.S./